

Terrence R. McInnis (#155416)  
(tmcinnis@rdblaw.com)  
Siavash Daniel Rashtian (#228644)  
(drashtian@rdblaw.com)  
ROSS, DIXON & BELL, LLP  
5 Park Plaza, Suite 1200  
Irvine, California 92614-8529  
Telephone: (949) 622-2700  
Facsimile: (949) 622-2739

Monique M. Fuentes (#205501)  
(mfuentes@rdblaw.com)  
ROSS, DIXON & BELL, LLP  
2001 K Street, NW  
Washington, DC 20006-1040  
Telephone: (202) 662-2000  
Facsimile: (202) 662-2190

*Attorneys for Defendant  
Executive Risk Specialty Insurance Company*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

## OAKLAND DIVISION

LENSCRAFTERS, INC., and EYEXAM OF CALIFORNIA, INC.,

**Plaintiffs,**

V.

LIBERTY MUTUAL FIRE INSURANCE COMPANY; EXECUTIVE RISK SPECIALTY INSURANCE COMPANY; UNITED STATES FIRE INSURANCE COMPANY; MARKEL AMERICAN INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY.

## Defendants.

## AND RELATED COUNTER AND CROSS-ACTIONS

No. C07-02853 SBA

[Related Case No. C 04-01001 SBA]

**DEFENDANT EXECUTIVE RISK  
SPECIALTY INSURANCE  
COMPANY'S ANSWER TO  
COMPLAINT**

Defendant Executive Risk Specialty Insurance Company (“ERSIC”), by and through its counsel, answers Plaintiffs’ Complaint in this action, as follows:

1. The first and second sentences of Paragraph 1 of the Complaint are ambiguous or incomplete, or purport to characterize the insurance policies at issue and the coverage provided

1 thereunder, which the terms of those policies speak for themselves. On these bases, ERSIC  
2 denies the allegations in the first two sentences of Paragraph 1 of the Complaint. The last  
3 sentence of Paragraph 1 of the Complaint states a legal conclusion as to which no response is  
4 required. To the extent a response is required, ERSIC denies the allegations therein.

5       2. With respect to the first sentence of Paragraph 2 of the Complaint, ERSIC denies  
6 the allegations as they relate to ERSIC. ERSIC lacks sufficient information to admit or deny the  
7 allegations in the first sentence of Paragraph 2 as they relate to other defendants, and on that  
8 basis, denies those allegations. With respect to the remaining allegations in Paragraph 2 of the  
9 Complaint, ERSIC denies that Plaintiffs fully and accurately set forth the contents of the  
10 complaint in Case No. C04-1001 SBA, or the findings of the Court therein, and as such, denies  
11 the allegations.

12       3. Upon information and belief, ERSIC admits the allegations in the first sentence of  
13 Paragraph 3 of the Complaint. ERSIC denies the allegations in the third and fourth sentences of  
14 Paragraph 3 to the extent they relate to ERSIC's conduct. ERSIC lacks sufficient information to  
15 admit or deny the remaining allegations in Paragraph 3 and on that basis, denies those allegations.

16       4. ERSIC admits the allegations in the first sentence of Paragraph 4 of the Complaint.  
17 The second sentence of Paragraph 4 of the Complaint purports to describe the relief sought by  
18 LensCrafters in this action, to which no response is required. To the extent any response is  
19 required, ERSIC denies the allegations.

20       5. Upon information and belief, ERSIC admits the allegations in Paragraph 5 of the  
21 Complaint.

22       6. Upon information and belief, ERSIC admits the allegations in Paragraph 6 of the  
23 Complaint.

24       7. Upon information and belief, ERSIC admits the allegations in Paragraph 7 of the  
25 Complaint.

26       8. ERSIC admits that it is a Connecticut corporation, but denies that its principal  
27 place of business is Connecticut.

1       9. Upon information and belief, ERSIC admits the allegations in Paragraph 9 of the  
2 Complaint.

3       10. Upon information and belief, ERSIC admits that Markel is organized under the  
4 laws of the State of Virginia, and on information and belief, denies the remaining allegations in  
5 Paragraph 10 of the Complaint.

6       11. Upon information and belief, ERSIC admits the allegations in Paragraph 11 of the  
7 Complaint.

8       12. ERSIC admits the allegations in Paragraph 12 of the Complaint.

9       13. Paragraph 13 states a legal conclusion to which no response is required. To the  
10 extent that a response is required, ERSIC admits that venue is proper in the Northern District of  
11 California.

12       14. With respect to the first sentence in Paragraph 14 of the Complaint, ERSIC admits  
13 that it issued Managed Care Organization Errors and Omissions Liability Policy No. 8167-2076  
14 to LensCrafters and Eyexam for the November 12, 2001 to November 12, 2002 Policy Period (the  
15 "ERSIC Policy") and that the remaining defendants issued insurance policies to LensCrafters and  
16 Eyexam. The remaining allegations in the first sentence of Paragraph 14 of the Complaint are  
17 ambiguous or incomplete, or purport to characterize the defendants' policies, which terms speak  
18 for themselves, and on these bases, ERSIC denies the remaining allegations in the first sentence  
19 of Paragraph 14 of the Complaint. The second sentence of Paragraph 14 of the Complaint is not a  
20 factual allegation, and as such, no response is required.

21       15. ERSIC denies the allegations in Paragraph 15 of the Complaint as they relate to  
22 ERSIC, but admits the allegations as they relate to the other defendants.

23       16. Upon information and belief, ERSIC admits the allegations in Paragraph 16 of the  
24 Complaint.

25       17. Upon information and belief, ERSIC admits the allegations in Paragraph 17 of the  
26 Complaint.

27       18. With respect to the allegations in Paragraph 18 of the Complaint, ERSIC admits  
28 that it issued Managed Care Organization Errors and Omissions Liability Policy No. 8167-2076

1 to Eyexam and LensCrafters for the November 12, 2001 to November 12, 2002 Policy Period.  
2 The remaining allegations in Paragraph 18 of the Complaint contain characterizations of the  
3 coverage afforded under the ERSIC Policy and do not fully and accurately describe the terms and  
4 conditions of the ERSIC Policy. ERSIC states that the terms of the ERSIC Policy speak for  
5 themselves, and on these bases, deny the remaining allegations in Paragraph 18 of the Complaint.

6 19. The allegations in Paragraph 19 of the Complaint contain characterizations of the  
7 coverage afforded under the ERSIC Policy. ERSIC denies that Paragraph 19 of the Complaint  
8 fully and accurately describes the terms and conditions of the ERSIC Policy. ERSIC states that  
9 the terms of the ERSIC Policy speak for themselves, and on these bases, deny the allegations in  
10 Paragraph 19 of the Complaint.

11 20. Upon information and belief, ERSIC admits the allegations in Paragraph 20 of the  
12 Complaint.

13 21. The allegations in Paragraph 21 of the Complaint contain characterizations of the  
14 coverage afforded under the U.S. Fire Policies. ERSIC denies that Paragraph 21 of the Complaint  
15 fully and accurately describes the terms and conditions of the U.S. Fire Policies. ERSIC states  
16 that the terms of the U.S. Fire Policies Policy speak for themselves, and on these bases, deny the  
17 allegations in Paragraph 21 of the Complaint.

18 22. Upon information and belief, ERSIC admits the allegations in Paragraph 22 of the  
19 Complaint.

20 23. The allegations in Paragraph 23 of the Complaint contain characterizations of the  
21 coverage afforded under the Markel Policy. ERSIC denies that Paragraph 23 of the Complaint  
22 fully and accurately describes the terms and conditions of the Markel Policy. ERSIC states that  
23 the terms of the Markel Policy speak for themselves, and on these bases, deny the allegations in  
24 Paragraph 23 of the Complaint.

25 24. Upon information and belief, ERSIC admits the allegations in the first sentence of  
26 Paragraph 24 of the Complaint. The remaining allegations in Paragraph 24 of the Complaint  
27 contain characterizations of the coverage afforded under the Westchester Excess Policy. ERSIC  
28 denies that the remaining allegations in Paragraph 24 of the Complaint fully and accurately

1 describes the terms and conditions of the Westchester Excess Policy. ERSIC states that the terms  
2 of the Westchester Excess Policy speak for themselves, and on these bases, denies the remaining  
3 allegations in Paragraph 24 of the Complaint.

4 25. Upon information and belief, ERSIC admits the allegations in Paragraph 25 of the  
5 Complaint.

6 26. The allegations in Paragraph 26 of the Complaint contain characterizations of the  
7 coverage afforded under the Westchester Umbrella Policies. ERSIC denies that Paragraph 26 of  
8 the Complaint fully and accurately describes the terms and conditions of the Westchester  
9 Umbrella Policies. ERSIC states that the terms of the Westchester Umbrella Policies speak for  
10 themselves, and on these bases, deny the allegations in Paragraph 26 of the Complaint.

11 27. ERSIC admits the allegations in Paragraph 27 of the Complaint.

12 28. With respect to the first sentence in Paragraph 28 of the Complaint, ERSIC denies  
13 that LensCrafters has fully and accurately set forth the contents of the complaint in the *Snow*  
14 Action, and as such, denies the allegations. With respect to second sentence in Paragraph 28 of  
15 the Complaint, ERSIC admits the allegations.

16 29. With respect to the allegations in Paragraph 29 of the Complaint, ERSIC admits  
17 that LensCrafters gave timely notice of the *Snow* Action to Liberty, that LensCrafters requested  
18 that Liberty and ERSIC defend the *Snow* Action, that both Liberty and ERSIC agreed to pay  
19 defense costs in the *Snow* Action under a reservation of rights, and that upon receiving a  
20 judgment in Case No. C-04-1001 SBA (N.D. Cal.), ERSIC contended that it had no current duty  
21 to defend unless and until the applicable Liberty policies were exhausted. ERSIC denies the  
22 remaining allegations in Paragraph 29 as they relate to ERSIC. With respect to any remaining  
23 allegations in Paragraph 29 as they relate to Liberty, ERSIC lacks sufficient information to admit  
24 or deny those allegations and on that basis, denies those allegations.

25 30. ERSIC admits the allegations in Paragraph 30 of the Complaint.

26 31. With respect to the allegations in Paragraph 31 of the Complaint, ERSIC denies  
27 that Plaintiffs fully and completely set forth the contents of the Court's January 20, 2005 Order  
28 and as such, denies the allegations.

1       32. With respect to the allegations in Paragraph 32 of the Complaint, ERSIC denies  
2 that Plaintiffs fully and completely set forth the contents of the Stipulation referenced therein and  
3 as such, denies the allegations.

4       33. With respect to the first sentence of Paragraph 33 of the Complaint, ERSIC denies  
5 that LensCrafters has fully and accurately set forth the contents of the November 22, 2005  
6 Amended Judgment, and as such, denies the allegations. ERSIC admits the allegations in the  
7 second sentence of Paragraph 33 of the Complaint.

8       34. Upon information and belief, ERSIC admits the allegations in the first sentence of  
9 Paragraph 34 of the Complaint. With respect to the remaining allegations in Paragraph 34 of the  
10 Complaint, ERSIC is without sufficient knowledge or information to form a belief as to the truth  
11 of the allegations and on that basis, denies the remaining allegations.

12       35. With respect to Paragraph 35 of the Complaint, ERSIC admits that LensCrafters  
13 requested that ERSIC contribute its remaining policy limits to fund a settlement of the *Snow*  
14 Action. ERSIC denies that it has refused to contribute its remaining policy limits to fund a  
15 settlement in the *Snow* Action. With respect to the remaining allegations in Paragraph 35 of the  
16 Complaint, ERSIC is without sufficient knowledge or information to form a belief as to the truth  
17 of the allegations and on that basis, denies the remaining allegations

18       36. ERSIC admits the allegations in Paragraph 36 of the Complaint.

19       37. ERSIC repeats and incorporates its responses to Paragraphs 1–36 of the  
20 Complaint.

21       38. With respect to the first sentence of Paragraph 38 of the Complaint, ERSIC denies  
22 the allegations as they relate to ERSIC, but admits the allegations as they relate to the other  
23 defendants. The second sentence of Paragraph 38 of the Complaint states a legal conclusion, and  
24 as such, no further response is required. To the extent a response is required, ERSIC denies the  
25 allegations.

26       39. With respect to the first sentence of Paragraph 39 of the Complaint, ERSIC denies  
27 the allegations as they relate to ERSIC. ERSIC is without sufficient knowledge or information to  
28 form a belief as to the truth of the remaining allegations in the first sentence of Paragraph 39 and

1 on that basis, denies the remaining allegations. The second and third sentences of Paragraph 39  
 2 of the Complaint purport to describe the relief sought by LensCrafters in this action, to which no  
 3 response is required. To the extent any response is required, ERSIC denies the allegations.

4 40. ERSIC admits the allegations in Paragraph 40 of the Complaint.

5 41. Each and every allegation of the Complaint not expressly admitted herein is  
 6 denied.

#### FIRST AFFIRMATIVE DEFENSE

7 The Complaint fails to state a claim against ERSIC upon which relief may be granted.

#### SECOND AFFIRMATIVE DEFENSE

10 Plaintiffs' claim is barred or limited by operation of Policy Endorsement No. 11, which  
 11 provides that the ERSIC Policy "shall be excess of and shall not contribute with: (a) Commercial  
 12 General Liability Insurance Policy No RG2-681-004130-031 issued by Liberty or any renewal or  
 13 replacement thereof, but only with respect to **Managed Care Activities**; (b) any other existing  
 14 insurance or self-insurance, unless such other insurance or self-insurance is specifically stated to  
 15 be in excess of this Policy; and (c) any indemnification to which an **Insured** is entitled from any  
 16 entity other than the **Insured Entity**."

#### THIRD AFFIRMATIVE DEFENSE

18 Plaintiffs' claim is barred or limited because ERSIC's obligation, if any, to indemnify  
 19 Plaintiffs for the *Snow* Action does not arise unless and until the applicable limits of liability  
 20 available under the underlying Liberty Policies are exhausted.

#### FOURTH AFFIRMATIVE DEFENSE

22 Plaintiffs' claim is barred or limited by the doctrines of res judicata, law of the case,  
 23 and/or collateral estoppel, by reason of the findings, orders and judgments entered in the action  
 24 captioned *LensCrafters, Inc., et al. v. Liberty Mut. Fire Ins. Co., et al.*, No. C 04-1001 SBA (N.D.  
 25 Cal.).

#### FIFTH AFFIRMATIVE DEFENSE

27 Plaintiffs' claim is barred or limited by the doctrines of equitable contribution and/or  
 28 equitable indemnity.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim is barred or limited by operation of law holding that ERSIC's duty as an excess insurer to indemnify is only triggered once the applicable Liberty Policies are exhausted.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim against ERSIC is barred or limited to the extent ERSIC's policy limits have been depleted or exhausted through the payment of Claims.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim is barred or limited by operation of Policy Section II(J)(2), which excludes coverage for "matters which are uninsurable under applicable law."

**NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim is barred by the doctrines of estoppel and waiver.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim is barred or limited to the extent that Plaintiffs' own action, or the actions of any third party, including the defendants in this lawsuit other than ERSIC, diminished Plaintiffs' right to the relief sought in the Complaint.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred by the doctrine of unclean hands.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or limited by operation of Policy Section III(A)(1), which excludes coverage for "**Loss** from any **Claim**" brought about or contributed to in fact by: (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission by any **Insured**."

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or limited by operation of Policy Section III(A)(2), which excludes coverage for "**Loss** from any **Claim**" brought about or contributed to in fact by: ... (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation."

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or limited by operation of Policy Section III(A)(3), which excludes coverage for "Loss from any **Claim** brought about or contributed to in fact by: ... (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled."

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or limited by operation of Policy Section II(J)(1), which excludes coverage for "fines, penalties, taxes, and punitive, exemplary or multiplied damages."

**SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred or limited by operation of Policy Section II(J)(2), which excludes coverage for "non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief."

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Coverage for any "Additional Insureds" is barred or limited by operation of Policy Endorsement No. 5, which limits coverage "to any actual or alleged act, error or omission in the performing of, or failure to perform, Managed Care Organization Business Activities by any Insured other than an Additional Insured."

**EIGHTEENTH AFFIRMATIVE DEFENSE**

To the extent that the application or negotiations for the Policy included materially false, inaccurate, incomplete, or otherwise misleading statements, representations or omissions, ERSIC would be entitled to a declaration that the Policy is *void ab initio*.

**NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred to the extent Plaintiffs seek to recover amounts within the retention of the Policy.

**TWENTIETH AFFIRMATIVE DEFENSE**

The defenses set forth herein reflect ERSIC's assessment based on the information of which ERSIC is currently aware. ERSIC expressly reserves, and does not waive any defenses to

1 coverage under applicable law and the Policy, regardless of when such defenses to coverage may  
2 have arisen or may arise.

3 WHEREFORE, ERSIC prays for judgment as follows:

- 4 1. That the Court enter judgment in ERSIC's favor and against Plaintiffs;
- 5 2. That Plaintiffs take nothing by their Complaint against ERSIC;
- 6 3. That the Court award ERSIC the costs of this litigation; and
- 7 4. For such other and further relief as the Court deems just and proper.

8 Date: September 4, 2007

9 Respectfully submitted,

10 ROSS, DIXON & BELL, LLP

11 /s/ Terrence R. McInnis

12 Terrence R. McInnis

13 and

14 Monique M. Fuentes  
Siavash Daniel Rashtian

15 *Attorneys for Defendant Executive Risk  
Specialty Insurance Company*